Supreme Court, U.S.
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NO. 82-677

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

* * *

PHILLIPS CRANE & RIGGING OF SAN ANTONIO, INC., and DELMAR PHILLIPS,

Appellants,

V.

BEN B. SHAW AND RUDY GARZA, as Tax Assessor-Collector of Bexar County, Texas,

Appellees.

* * *

On Appeal from the Supreme Court of Texas

* * *

MOTION TO DISMISS OR AFFIRM

* * *

THOMAS GOGGAN
416 Littlefield Building
Austin, Texas 78701
(512) 477-9412
Counsel of Record

OLIVER S. HEARD, JR.
1019 Tower Life Building
San Antonio, Texas 78205
(512) 225-6763
Counsel for Appellees

January 6, 1983

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Appellees respectfully submit this their Motion To Dismiss the Appeal in the above-entitled and numbered cause, or, in the alternative, to affirm the Judgment below and in support of which show:

I.

The Appeal should be dismissed because no substantial federal question is presented.

II.

The Judgment should be affirmed because any federal question presented is so manifestly unsubstantial as to not warrant further argument.

This Appeal superficially presents mixed questions of federal and state law. It is Appellants' position, as Appellees understand it, that the Texas statutes authorizing seizure and sale of personal prcperty for the satisfaction of delinquent ad valorem taxes are repugnant to the Federal Constitution because Texas law fails to provide adequate judicial review. Thus, the threshold inquiry must be an examination of the review provided by Texas law. The secondary question is whether such procedures are adequate under the Texas Constitution.

I. Texas Law Provides Ample Remedies For Contest and Review of Tax Seizures.

The Opinion of The Supreme Court of Texas accurately describes the abundance of remedies afforded to an aggrieved taxpayer before, during and after the process of seizure and sale of property.

As the Court points out, a Texas taxpayer is under a duty to render his property, at a value set by the taxpayer, on June 1 of each year. Only upon the taxpayer's failure or refusal to render his property is the County Tax Assessor authorized to render the property for the taxpayer. In either event, the taxpayer is entitled to ten days notice and the right to

contest the valuation before the Board of Equalization. A taxpayer who is dissatisfied with the action of the Board of Equalization has recourse to judicial review in the Courts of Texas. *Carrol v. Lee*, 451 S.W. 2d 766 (Tex. Civ. App. — Texarkana, 1970, ref. n.r.e.); *Atlantic Richfield Co. v. Warren Independent School District*, 453 S.W. 2d 1980, ref. n.r.e.

Even a taxpayer who fails to render his property as required by law, fails to avail himself or herself of the administrative remedies before the Board of Equalization, fails to pursue judicial review of the valuation of his property or the tax rate, and fails to pay his taxes when due, may test the legality of the seizure during the actual process of seizure and sale. *Texas Revised Civil Statutes* Article 7273 (1960) provides that the Collector must wait at least ten days prior to disposing of any property seized pursuant to *Texas Revised Civil Statutes Annotated* Article 7266 (1960). The Supreme Court of Texas correctly points out this affords the taxpayer the right, under Texas law, to bring a suit for declaratory judgment to determine the legality of the taxes and to enjoin the collection pending judicial determination of the taxpayer's contentions.

The procedural history of the case at bar is a vivid illustration of the adequate, if not exhaustive, judicial review accorded to a Texas taxpayer by local law. This case has now been considered by three District Courts (the basic trial Court of Texas), twice considered by the intermediate appellate court and twice considered by the Supreme Court of Texas. During all of this protracted litigation the taxpayer has totally failed to bring forward any theory, let alone any evi-

dence, concerning the inaccuracy or illegality of the tax. Still, through all of this litigation, the Tax Collector has been prohibited from disposing of the property *due to the safeguards afforded by the law of Texas.*

Finally, as the Supreme Court of Texas points out, a taxpayer who also fails to contest the seizure during the process, may come in after the fact with a suit for a refund.

The Appellant and Amicus Curiae appear to be taking the astonishing position that the Supreme Court of Texas is in error on this point. (Jurisdictional Statement Pg. 9, Brief For Amicus Curiae Pg. 3.) It is respectfully submitted that the Supreme Court of Texas is the final authority on the local law of Texas, and if the Supreme Court has so declared the law, that is dispositive of the matter.

Thus, as declared by the Supreme Court of Texas, a Texas taxpayer is afforded administrative and judicial remedies before, during and after the process of seizure and sale.

II. The Texas Remedies Are Adequate Under The Federal Constitution.

It is Appellants' position, as Appellees understand it, that although Texas law affords administrative and judicial remedies before the Board of Equalization and the Courts, the right to a declaratory judgment and injunction during the process of seizure and sale, and a post seizure suit for refund, Texas law is constitutionally defective because it does not pro-

vide yet one more hearing immediately *prior* to seizure. This position has been expressly rejected by this Court. *Phillips v. Commissioner*, 283 U.S. 589 (1931); *Fuentes v. Shevin*, 407 U.S. 67 (1972).

The collection of revenues is an important governmental function directly under the control of a governmental officer. As the Supreme Court of Texas points out there is a special need for taxes to be paid when due in order that the County Commissioner's Court may meet the financial obligations of the county. This Court has recognized this special need in connection with the collection of federal revenues.

Moreover, the Texas seizure and sale statutes apply only to *personal property* which is notoriously movable. This is a further illustration of the special need for seizure and sale statutes, particularly when ample and adequate contest and review procedures are available.

CONCLUSION

For the reasons set forth above, Appellees pray that this Court enter its Order Dismissing this Appeal, or in the alternative, that the Judgment of the Supreme Court of Texas be affirmed.

Respectfully submitted,

THOMAS GOGGAN
416 Littlefield Building
Austin, Texas 78701
(512) 477-9412
Counsel of Record

OLIVER S. HEARD, JR.
1019 Tower Life Building
San Antonio, Texas 78205
(512) 225-6763

By: Thomas Goggan
THOMAS GOGGAN

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Motion To Dismiss or Affirm was this 6th day of January, 1983, forwarded to Mr. Gary Pinnell and Mr. Leonard Wayne Scott, Counsel for Appellants, and to Mr. Lawrence A. Haddad and Mr. Thomas M. Thurmond, Counsel for Amicus Curiae to their appropriate addresses.

Thomas Goggan

THOMAS GOGGAN